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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.
No. 346.

THE EASTERN CHEROKEES, APPELLANT,
vs.
THE UNITED STATES AND THE EASTERN CHEROKEES.
No. 347.

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Appeals from the Court of Claims.

Reply Brief of Eastern Cherokees to the Brief for the United States.

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Reply Brief of Eastern Cherokees to the Brief for the United States.

Counsel for the United States insists that the United States is not indebted to the Eastern Cherokees and makes the following argument, to wit:

I.

First That under the treaty of 1835 the Indians well understood that they were to pay the cost of their own removal, and that the $600,000 allowed by the Senate was merely an addition to the $5,000,000 fund, an enlargement of that fund, and no commitment on the part of the United States to pay the cost of the removal if it should exceed that sum.

The Eastern Cherokees have fully answered this contention (E. C. brief, 40 to 70). The fact is the Indians understood the precise contrary, and it is so expressed on the face of supplementary article 2 of the treaty. It is as follows (italics ours):

> "Art. 2. Whereas the Cherokee people have supposed that the sum of $5,000,000 fixed by the Senate in their resolution of the day of March, 1835, *as the value* of the Cherokee lands and possessions east of the Mississippi River was *not intended to include the amount 'which may be required to remove them.'* . . . Which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and—
>
> "Whereas the President is willing that this subject should be referred to the Senate for their consideration, and *if it was not intended by the Senate* that the above mentioned sum of $5,000,000 should include the objects herein specified, *in that case* further provision should be made therefor as might appear to the Senate to be just."

Obviously, the Cherokees who signed this treaty did not understand that any part of such removal was included or

to be included in the $5,000,000 fund. They regarded the value of their lands and possessions $20,000,000. The Senate, fixed the value at $5,000,000. The $5,000,000 fund was *the value* of their lands and possessions as fixed by the Senate. The United States was already under treaty obligation to pay the cost of removal and subsistence (Art. 8, 1828), and why should their property be used to discharge this obligation of the United States? Even the Senate itself, by this article, is put on record as declaring that the above mentioned sum of $5,000,000 should not include removal expenses. It was only *"in that case"* that they were to make further provisions. It is most significant that they made a provision *estimated as more than sufficient* to pay the entire cost of removal, and thus demonstrated the Senate's intention (to whose decision the question had been left), to pay the entire cost of removal and charge the Cherokees with no part thereof.

Congress on July 2, 1836, immediately confirmed the interpretation of the Senate by appropriating the $5,000,000 purchase money in one act to the Cherokees and the $600,000, as a different and distinct appropriation for removal expense.

But if the argument were true, that the $600,000 and the $1,047,067 were merely an enlargement of the $5,000,000 fund, then, the United States, by the terms of the treaty, would be forbidden to take credit for exceeding the amount of $20 per capita for removal, and $33.33 for subsistence, which was the commutative rate agreed on in article 8 of that treaty (Record, 86), and this would make the Government's indebtedness a far larger sum than allowed by the account rendered in 1894.

The United States not only committed itself, by supplementary article 2 of this treaty, to pay the entire cost of removal, but its representatives continued to ex-

plain, in 1836 and 1837, to the Indians that the United States would pay the cost of removal and subsistence, as through the War Department's instruction to United States Indian agent Curry (Exhibit 1.16), and through its enrolment agent, Lieut. Van Horne (Exhibit 1.22).

In the case of the Choctaw Nation *vs.* The United States (119 U. S., 1), it is said in the syllabi:

> "The relation between the United States and the Indian tribes, being that of a superior towards an inferior who are under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted *as justice and reason demand* in cases where power is exerted by the strong over those to whom they owe care and protection. (U. S. *vs.* Kagama, 118 U. S., 375, cited and applied)."

It is obvious, under this rule of interpretation, that—

> "the sum of $5,000,000 fixed by the Senate in their resolution of the——day of March, 1835, as *the value* of the Cherokee lands and possessions east of the Mississippi River"—

could not be used by the United States to pay its own obligations, incurred "in the execution of its own policy and in the furtherance of its own interests," regardless of the treaty of 1835, or of the treaty of 1828.

We have shown that it was made by an unscrupulous agent and enforced by military power. The treaty of 1835 was to all intents and purposes an act of sovereign power, and it should be interpreted as "justice and reason demand." It would not be just, it would not be reasonable, to charge the value of the property of the Indians as fixed by the Senate with the cost of removal, because

removal expense was a Government obligation, and because such expenditure was purely for the benefit of the Government. The removal was greatly desired by the United States and bitterly opposed by the Cherokees, thousands of whom lost their lives because the Government insisted upon the removal.

The Indians who made the treaty undoubtedly believed that the United States would pay the cost of removal. The President and his Commissioner negotiating the treaty thought the removal would only cost $255,000 and spoliations $250,000, and the Congress made the appropriation accordingly, but made it for a sum larger by $95,000 than required by this estimate. And in 1838 Congress again appropriated the full amount estimated as necessary to pay the entire cost of removal. The fund appropriated expressly for removal was abundant, and, of course, the Indians understood the United States would pay the cost of removal out of the abundant funds appropriated for such purpose.

There can be no doubt that when Congress in 1836 appropriated a sum believed to be more than sufficient to pay the entire cost of removal, and when Congress in 1838 again provided a sum actually more than sufficient to pay the estimated cost of removal, Congress well understood that the cost of removal was not chargeable to the $5,000,000 fund, but was chargeable to the Treasury of the United States. There is no doubt whatever that the Indians so understood. The Indians had a right to so understand it, not only from the treaty and from the repeated assurances of the officials of the United States, but from these appropriation acts as well.

If the auditor's office had charged removal expenses to the fund appropriated for removal, as advised by opinion of Attorney-General B. F. Butler, the $5,000,000 fund would not have been touched.

II.

The second argument of Government counsel is as follows:

Second. "That the appropriation of June 12, 1838, was merely a further enlargement of the $5,000,000 fund, an addition thereto, and that the Cherokees understood that if this sum was not sufficient, the excess was to be charged to the $5,000,000 fund."

It is perfectly obvious that the Cherokees did not understand that removal expenses were to be charged to the $5,000,000 fund, if this sum was not sufficient.

The Secretary of War made the proposition to John Ross on the 18th day of May, 1838, in which it was expressly declared that he thought the expense of removal should be borne by the United States, and that application would be made to Congress for that purpose. Congress appropriated the full amount estimated as necessary, not only to pay removal costs, but *to aid in* paying subsistence expenses. It was not supposed that this sum was insufficient, of course, either by the United States or by the Cherokees. It was believed to be more than sufficient by everybody, and **it was more than sufficient.** (Brief, 63).

The astonishing feature of this matter is, that the amount thus appropriated by Congress for this removal was left untouched in the Treasury of the United States until 1839, the removal having taken place in 1838, and no part of it was then used for removal. But the expense of removal in 1838 was entirely taken from the $5,000,000 fund by the War Department. This was in direct violation of the statute itself, which had provided that no part of the money appropriated for the removal should be deducted from the $5,000,000 fund. In the

face of this direction from Congress, the War Department used from this $5,000,000 fund, $1,111,284.70, and never did use any part of the $1,047,067 appropriated for removal, except subsequently to 1838 the inconsiderable sum of $49,095.31 (Rec., 90, pars. 2 and 3).

This is the transaction which the Government counsel must now explain. It is impossible to explain it.

Government counsel (60) quotes with approval Senator White's report, that the money paid the Cherokees in 1836 "as the difference in value between the countries" was "a very liberal consideration on the part of the Federal Government," and referring to the $1,047,067 as a "voluntary" grant.

We have heretofore fully answered this argument (Sen. Doc., 392, 56th Cong., 1st Sess., p. 18) Exhibit 2.

There was no country exchanged. The Cherokees had owned the country west for ten years from 1828, and Senator White's report was not intended as any interpretation of treaties.

If the theory of the Government counsel, that the $600,000 appropriated July 2, 1836, and the $1,047,067 appropriated June 12, 1838, were merely additions to the purchase price of the lands and subject, not to the charges definitely directed by the appropriation acts, but to miscellaneous charges to which the $5,000,000 fund was subject, then Government counsel would be in a far worse position, because, then, credit could o ly be taken by the United States under the treaty, at the commutation rate of $20 for removal and $33.33 for subsistence, as the Cherokees emigrated themselves. In the Slade-Bender account the Government got credit for $1,382,172.91 on account of removal; but, under this theory of Government counsel, the United States would only be entitled to credit for removing 16,957 persons, the number fixed by the Supreme Court, at the rate of $53.33, making the sum of $904.373.33. This would add

to the amount found by Slade-Bender the sum of $477,799.57.

III.

Government counsel argues:

Third. That the Cherokee Nation made a contract with General Scott, in which it was distinctly understood that if the expense of removal exceeded the amount appropriated for that purpose, it should come out of the $5,000,000 fund.

Congress appropriated, July 2, 1836, and June 12, 1838, sums estimated as more than sufficient. The appropriations in fact for this purpose, $1,647,067, were more than sufficient to pay the entire cost of removal.

When the Government made the contract with John Ross and his associates, it was with the understanding that the cost of removal should be at the expense of the United States, whatever the cost. Nobody supposed the amount appropriated for that purpose was insufficient, or that there would be any excess. John Ross was only allowed by General Scott for removing these Indians, on contract, the sum of $776,399.04, as the contract made by the Government officials apparently contemplated an eighty days' journey. Nobody knew it would exceed eighty days, and the sum contracted to be paid John Ross, and which was paid John Ross on the eighty days' contract, could easily have been taken from the $1,047,067 without exhausting it, so that this argument of Government counsel is entirely unwarranted, and besides it is contradicted, in numerous particulars, by the correspondence between the Cherokees and the Government officials, as we have most abundantly pointed out in our memorial to Congress filed in this case. Sen. Doc. 392, 56th Congress, 1st Session.

The fact is, the captive Cherokees, referred to, denied

the treaty of 1835 as a fraud on them and on the United States. They declared in numerous printed protests that they would not recognize it in any manner whatever. The court has found in this case that the Eastern Cherokees never conceded themselves to be a party to it until 1846 and then only as therein set forth. It is obvious that since these Cherokees denied the treaty and did not recognize it, they can not be held at the same time to have made a contract binding themselves to the proposition that removal expenses should come out of a $5,000,000 fund, which they then utterly repudiated.

IV

Government counsel argues:

Fourth. That the Cherokees understood that the final settlement of John Ross was to come out of their own funds.

We have already shown the contrary was the case. The findings of fact in which Government counsel acquiesced in this case are a sufficient answer to this pretension, because the court found that the treaty of 1846 was entered into "**to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be** (Record, 93)." They recognized no $5,000,000 fund until 1846 and made no contract with regard to it, and could have made none, because they insisted that the treaty under which the $5,000,000 fund arose was not binding on them; that they would not recognize it in any respect whatever. This entire record is set up at length in Sen. Doc. 392, 56th Congress, 1st Session, filed in this case. The Cherokees in their memorial, in regard to this treaty, said:

> "We reject all its terms. We will receive none of its benefits. If it is to be enforced upon us, it will be by your superior strength. We shall offer

> no resistance, but our voluntary assent never will be yielded. We are aware of the consequence; but while suffering in all its bitterness, we shall submit our case to an all-wise and just God, in whose province it is to maintain the case of suffering innocence and unprotected feebleness" (43 *Ibid.*, para. 5).

No act at variance with this emphatic position was taken by the Cherokees until they agreed to the treaty of 1846.

The correspondence referred to by Government counsel does not warrant any other understanding than this.

The committee of captive Cherokees who determined upon emigration declared in the face of their resolution that, "It was under a special understanding with the Honorable Secretary of War," (33 *Ibid.*, sec. 3.) and John Ross, in his letter of July 23, 1838, proposed that the compensation should be paid by the United States (34 *Ibid.*, sec. 3).

Gen. Winfield Scott, in his letter of July 25, 1838, said:

> "The United States, through me, are willing to stipulate to pay over to the Cherokee functionaries, from time to time, such portions of the *moneys appropriated for the emigration* as may seem reasonable and proper for and to carry it out" (34 *Ibid.*, sec. 10).

And the Cherokee committee, in authorizing John Ross to receive money from General Scott, only authorized him—

> "to enter into such further arrangements with the commanding general, in relation to the payment of such *sums of money by the United States*, as may be necessary for the removal and subsistence of all the Cherokee people" (35 *Ibid.*, sec. 1).

The money appropriated for this purpose (Rec., 90, sec. 1), however, was not used. It was left in the treasury, while the $5,000,000 fund was used.

Government counsel lays great stress upon General Scott's comment that the Cherokees were interested in an economical administration of the fund appropriated for their removal, and argues therefrom that the Cherokees understood this money would not be paid out of the sums appropriated for that purpose, but out of the $5,000,000 fund, which was not appropriated for that purpose.

General Scott said in his letter of August 1, 1838 (italics ours):

> "I repeat that I do not absolutely reject or cut down your estimate in putting down the rations at 16 cents each. The whole expense of the emigration is to be paid *out of the appropriations already made by Congress*, the general surplus of which is to go to the Cherokee Nation in various forms; therefore they have a direct general interest in conducting the movement as economically as comfort will permit" (38 *Ibid.*, 4).

General Scott in his letter of August 2, 1838 said:

> "As the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel myself at liberty to withhold my sanction."

This language applies with precision to the appropriation of $600,000 of July 1, 1836 and $1,047,067 of June 12, 1838, and it does not apply to the $5,000,000 fund, which was not appropriated for removal.

The use of the term "Trust Fund" in General Scott's testimony (Gov. Brief, 68), is seized upon as a reference to the $5,000,000 fund with which General Scott had nothing to do and to which he did not refer. His reference was to the removal fund appropriated to remove the Cherokees, the balances of which were held in *trust* for subsistence and education.

Government counsel argues that the Cherokee resolution of November 11, 1840, contemplated charging the $5,000,000 fund with the expense of the emigration.

It did nothing of the kind. On the contrary, the Cherokees did not recognize the $5,000,000 fund, and in this resolution referred to (Sen. Doc. 392, 56th Congress, 1st session, page 51) stated explicitly that delays in the emigration had "consequently enlarged proportionately the cost of the emigration *to the United States*" (*Ibid.*, 51, sec. 2), and only authorized John Ross to make settlement on behalf of the Cherokee Nation of the sum due, "as stated in the emigration claim" (*Ibid.*, 51, sec. 8). The emigration claim referred to was as follows:

> "The United States in account with the Cherokee nation for the expense incurred in the removal of the Cherokees *under an arrangement with Major General Winfield Scott.*"

John Ross was, to all intents and purposes, the "Cherokee Nation" in this transaction, and the Hon. Felix Grundy, Attorney-General of the United States, in his opinion of March 20, 1839 (3 Op., 432), declared that the employment of John Ross was "a moral necessity."

The account rendered, above referred to, will be found on page 56, Report 288, H. R., 27th Congress, 3rd session. The total amount was $1,357,745.86¼, which was credited—

> "By cash received of Capt. J. Page, U. S. *Disbursing Agent*, on signed requisitions, drawn on Major General Winfield Scott, $776,398.98."

The evidence on the John Ross contract will be found in Sen. Doc. 392, Fifty-sixth Congress, first session, pages 47 to 52 inclusive, filed in this case. The claim of John Ross was against the United States. He had no reason to believe that the United States would attempt to charge

the account due him to the Cherokees out of the $5,000,000 fund, when they did not recognize the fund itself, and when at the time of this settlement the President of the United States, John Tyler, on September 20, 1841, promised John Ross to make a treaty with the Cherokees which should give to the nation full indemnity for all wrongs which they may have suffered (E. C. Brief, 47). (Sen. Doc. 140, 28 Cong., 2d Sess.)

V.

Government counsel agues:

Fifth. That by the treaty of 1846 it was well understood by the Cherokees that the cost of removal should be charged to the $5,000,000 fund, and that the Senate in striking out the twelfth article had refused to consider the claim that removal was not chargeable to the $5,000,000 fund. That removal was charged, in the Western Cherokee case, to the $5,000,000 fund, and therefore that case is a precedent for charging the $5,000,000 fund with removal in making settlement with the Eastern Cherokees.

We have answered this contention heretofore (E.C. Brief, 76 to 94), but for further answer point out that the preamble of the treaty of 1846 expressly declares it was drawn for the purpose of *settling the claims* of the Cherokees against the United States, not for annulling them, and Attorney-General Crittenden, immediately after the treaty was made, April 16, 1851, in an official opinion, said:

> "The treaty of 1846 does not expressly, nor by implication, abrogate any of the interests of the Cherokees in the distribution per capita provided for in articles 12 and 15 of the treaty of 1835.

> The Treaty of 1846 intends to provide for satisfaction of those claims, not to forfeit, repeal, or annul any of them" (5 Op., 320).

The construction of Government counsel would not give the Cherokees the "fair and just settlement" promised by the ninth article of the treaty of 1846. Such a settlement would not "exhibit money properly expended under the Treaty of 1835," but would exhibit money improperly expended thereunder.

Government counsel argues that article 9 intended to declare that *all sums* paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, etc., were *properly* expended under the treaty, and that article 9 really intends to commit the Cherokees to the proposition that all sums paid under all heads were properly chargeable to the Cherokees. If this were true, then the article should not have proposed a "fair and just settlement under the treaty of 1835," and it should not have proposed to exhibit "all money properly expended under said treaty," because under this interpretation article 9 would mean that whether said sums were properly expended or not under that treaty, nevertheless, under the treaty of 1846, they were chargeable.

On this theory there was no need for a treaty at all as far as the poor Cherokees were concerned.

Government counsel quotes, with approval, the letter of the Department of Justice of December 2, 1895 (Sen. Doc. 16, 54th Congress, 1st Session, U. S. Brief, 101), as follows:

> "If nothing more was intended than a mere reiteration of the obligations of the Treaty of 1835, without any attempt to settle its disputed construction, it is difficult to imagine any occasion for the treaty. The language which follows that just

> quoted removes all doubt, viz, 'and shall embrace all sums paid for improvements, ferries, spoliations, removal, subsistence,' etc. Certain purposes for which it was agreed that money had been 'properly expended under such treaty' are here recited, and that of removal is one of them."

The treaty of 1846 was not drawn for the purpose of settling any disputed construction of the treaty of 1835. The Cherokees denied its existence as a treaty and refused to be bound by it or any part of it.

This letter finds it difficult to *imagine* any occasion for the treaty unless the Cherokees intended to relinquish what had been promised them. If the writer of this letter had known the facts, or if he had given any hearing to the Cherokees before writing it (which he did not), the gross error of this letter would not have been committed. The **"occasion"** for this treaty was a bloody factional war among the Cherokees; the necessity of making the Eastern and Western Cherokees parties to the treaty of 1835–36, which they had never conceded themselves to be; and to pay [not to deny] the Cherokees the money which had been promised them.

The triumphant discovery that removal was one of the things "for which it was agreed that money had been properly expended, under such treaty," and the implied argument that therefore it was properly chargeable to the $5,000,000 fund is obviously absurd.

Of course money had been properly expended for removal under the treaty and the laws relating thereto, but that is not the question. The question is whether such expenditure was properly chargeable to the $5,000,000 fund.

We have conclusively shown that such expenditure was not properly chargeable to that fund under such treaty; that Congress appropriated a sum more than sufficient to pay the entire cost of removal; that

the accounting officers had, in violation of law, charged the $5,000,000 fund with removal expenses, and had not charged the sum appropriated for removal, with removal expenses, as they ought to have done under the plain tenor of the appropriation act, and under the opinion of Attorney-General B. F. Butler (3 Op., 297), who had expressly passed upon this question for their benefit.

We have shown that if the accounting officers had done their duty as instructed by the opinion of Attorney-General Butler, this erroneous charge against the $5,000,000 would not have occurred, and the Eastern Cherokees would have received the sum now in controversy, to-wit, $1,111,284.70, with interest, in the settlement of 1852, as a per capita payment.

Government counsel believes that "all sums" paid under "improvements" were properly paid and should be charged to the $5,000,000 fund under article 9. But article 3 declares the contrary; that certain sums paid under that head had been improperly expended and should be reimbursed to the $5,000,000 fund; thus contradicting the inference of Government counsel.

Government counsel thinks that "all sums" paid under the head of "spoliation" were properly charged to the $5,000,000 fund; that article 9 can mean nothing else than this. But article 3 contradicts this inference and directs that certain sums which had been paid, under the head of "spoliation," out of the $5,000,000 fund, (not justly chargeable to that fund), must be reimbursed, so that article 3 contradicts this inference.

Government counsel thinks that "all sums" paid under "claims" were properly chargeable to the $5,000,000 fund, but article 3 expressly declares that various claims have been improperly paid out of the $5,000,000 fund and were not justly chargeable to that fund, thus contradicting the inference with regard to "claims."

Government counsel thinks that "all sums" paid for

"subsistence" were by the ninth article agreed to have been properly charged to the $5,000,000 fund, but article 11 of the same treaty leaves this as a question in dispute to the Senate of the United States, and the Senate decided, in effect (September 5, 1850), that no amount paid for subsistence was properly chargeable to the $5,000,000 fund.

Government counsel thinks in like manner, that he is justified in drawing the inference that "all sums" paid for removal were chargeable to the $5,000,000 fund. This inference is contradicted by article 3, which declares that the United States should "reimburse all other sums paid to any agent of the Government and improperly charged to said fund." The fund paid for removal expense was paid to Captain John Page, an agent of the Government and by him expended, and under article 3 should be reimbursed. Captain John Page, disbursing agent of the United States, paid John Ross alone out of the $5,000,000 fund, $776,398.98 (H. R. Report 288, 27th Congress, 3rd Session, page 56).

The interpretation (by inference) of Government counsel that article 9 intended to authorize "all sums" paid for improvements, spoliations, claims, removals, subsistence, etc., to be charged to the $5,000,000 is not only irreconcilable with other articles of the treaty, 3, 9 itself, 10 and 11, but is entirely at variance with the plain common sense meaning of this treaty, which was entered into to reconcile the Cherokees to the treaty of 1835–36 and to pay them what was promised by that treaty.

The inference of Government counsel is forbidden by the very next article of the treaty (Art. X).

> "Article X. It is expressly agreed that nothing in the foregoing treaty contained, shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now

residing in the States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto."

Yet Government counsel would construe the preceding article 9 so as to take away over $1,000,000 from the per capita of these Cherokees. Under any rule of interpretation much less under the rule of interpretation laid down in Choctaw Nation *vs.* The United States, that the acts of the United States in dealing with the Indians "in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand," the interpretation of Government counsel is entirely impossible.

On January 4, 1843 (H. R. Report 288, 27th Congress, 3d Session, page 52), the Secretary of War, J. C. Spencer, submitted to the House of Representatives a report of the second auditor showing that the sum of $674,527.97 had been paid to Harrison & Glasgow for rations for the Cherokees and taken out of the $5,000,000 fund; the same auditing department of the United States (when the Senate was required to decide whether the $5,000,000 fund was chargeable with the cost of subsistence) reported to Congress that the amount which had been so charged was only $189,422.76, which was reimbursed by Congress, to this extent only, September 30, 1850 (Rec., 96).

This is the kind of bookkeeping which has been the undoing of the poor Cherokees.

If the United States had given the Cherokees a clean transcript from the trust ledgers of the auditing department the injustice of these accounts would have been made manifest, and the exposure of the auditing department complete.

The Eastern Cherokees of North Carolina, who never removed west, only received as a per capita for their land

cession $56.31 in 1852, excluding interest (Record, 109).

There were 16,321 Eastern Cherokees all told (Rec., 109); they sold the United States 7,882,240 acres (Rec., 110), which equals 485 acres per capita. For the purchase price of 485 acres the Indians, who did not remove, received per capita only $56.31, excluding interest. If they were paid the full amount they now claim, including this $56.31, they would only receive a total of $124.78 (Rec., 109), excluding interest, about 25 cents an acre, after waiting 70 years.

If "reason and justice" be done these people, the amount they now claim will be paid them. This would be but a pitiful compensation for the country these helpless Indian children were compelled to relinquish by their "Great Father."

Government counsel enlarges upon article 12, an item proposed by the Western Cherokees and omitted from the treaty.

We are therefore compelled to set it out in order to show that there is nothing whatever in such contention.

> "Article 12. The Western Cherokees, called 'Old Settlers,' in assenting to the general provisions of this treaty, in behalf of their people, have expressed their fixed opinion that, in making a settlement with them upon the basis herein established, the expenses incurred for the removal and subsistence of Cherokees, after the 23d day of May, 1838, should not be charged upon the $5,000,000 allowed to the Cherokees for their lands under the Treaty of 1835, or on the fund provided by the third article of the supplement thereto [$600,000], and that no part of the spoliations, subsistence, or removal provided for by the several articles of said treaty and the supplement thereto, should be charged against them in their settlement for their interest in the Cherokee country, east and west of the Mississippi River. And the delegation of 'Old Settlers,' or 'Western Cherokees,' propose that the question shall be

submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliation, under the Treaty of 1835, is properly and legally chargeable to the $5,000,000 fund. And they will abide by the decision of the Senate."

(The removal expense prior to May 23, 1838, had not touched the $5,000,000 fund.)

While this was a Western Cherokee proposition exclusively, with which the Eastern Cherokees were not concerned, there was good and sufficient reason to omit it from the treaty, because, under articles 4 and 11, every item in article 12, was otherwise provided for.

Under the plan proposed by article 4, at $20 per capita for removal, the $5,000,000 fund would not be touched for removal expenses in settling with the Western Cherokees, as will appear from the following table, taken from the opinion of the Supreme Court of the United States (148 U. S., 477):

The treaty fund [$5,000,000 and $600,000]		$5,600,000 00
For 800,000 acres of land	$500,000 00	
For general fund	500,000 00	
For improvements	1,540,572 27	
For ferries	159,572 12	
For spoliation	264,894 09	
For debts, etc	60,000 00	
For removal of 16,957 Cherokees at $20 each	339,140 00	
	3,364,178 48	3,364,178 48
Giving as the residue to be divided per capita		2,235,821 52
One-third due the Western Cherokees		$745,273 84
Less payment September 22, 1851		532,896 90
Leaving a balance of		212,376 94

(Record, 102.)

It will be seen from this settlement that the $300,000, appropriated primarily for removal, was not exhausted when the removal of 16,957 Cherokees was, charged against it, and that the $5,000,000 fund was therefore, not touched by removal expenses in this settlement with the Western Cherokees.

It is obviously just that the United States should receive credit out of the $600,000 appropriated for removal and spoliations to the full extent of the amount so appropriated and expended for that purpose. The $5,000,000, appropriated to the Cherokees in payment of their land, was not subject to the charge of removal, and was not charged with the expense of removal in making the settlement with the Western Cherokees, as clearly appears. The mere fact that, for convenience of stating the account, two appropriations of $5,000,000 and $600,000 are placed together as an aggregate, does not warrant the theory that the cost of removal was charged against the fund not appropriated for that purpose, any more than it would be right to say that the $500,000 agreed to be paid for the neutral lands was paid out of the $600,000 appropriated for removal. One conclusion is as unreasonable as the other.

The question of subsistence was provided for in the eleventh article, to be left to the United States Senate, and therefore there was nothing in article twelve not otherwise covered by the other articles of the treaty. It was consequently omitted.

VI.

Government counsel argues:

Sixth. That the receipts of the Eastern and Western Cherokees in 1851 and 1852 were receipts in full and binding as against the Eastern Cherokees, although not against the Western Cherokees.

The Cherokee National Council, on November 27, 1851, protested against this settlement in the terms set forth

in the findings of fact by the Court of Claims (Record, 98), which was transmitted to the Commissioner of Indian Affairs in April 1852, before the Cherokees received any of this money. The United States contracted with the Cherokee authorities as the representatives of the communal owners in acquiring the lands by the treaty of 1846, and the same Cherokee authorities acted for the communal owners in protesting against the proposed partial payment. The Government is estopped from denying the right of the Cherokee authorities to protest on behalf of the Eastern Cherokees.

The Cherokees having made a proper protest, before receiving the payment, in the most impressive way known to them, by resolution of the National Council of November 27, 1851, of course the cases of U. S. *vs.* Adams and U. S. *vs.* Childs (Brief, 91) have no application or force.

The act of Congress did not require the Eastern Cherokees, however, to execute a full and final discharge for all claims and demands whatsoever on the United States, without exception, but expressly excepted **"such money and lands, if any, as the United States may hold in trust for said Cherokees"** (Record, 100).

By the act of July 2, 1836, the United States had appropriated the sum of $5,000,000 (less $500,000 paid for "neutral land"), which was placed to the credit of the Cherokees in the Treasury of the United States. This fund undoubtedly was a trust fund held by the United States "in trust" for the purposes set forth in the treaty, among others "in trust" for per capita purposes. By article 15 of the treaty of 1835–36, it was provided that the balance of this fund should be paid to the Eastern Cherokees per capita. The same provision was made by article 9 of the treaty of 1846, and this per capita fund was held "in trust" for the Eastern Cherokees, the very people who were required to execute the receipt of 1852. This receipt made an exception of money held "in trust"

for said Cherokees (Record, 100). The receipt of 1852 would be no acquittance to the United States as against this per capita fund, because the fund was held "in trust" for these Cherokees.

Independently of these two complete defenses, that they were not required to receipt for funds held in trust for them and made a protest against the proposed settlement before receiving the payment of 1852, the whole matter was opened by the agreement of December 19, 1891, and again by the jurisdictional acts of July 1, 1902, and March 3, 1903.

When the United States authorized the Cherokees to bring suit for any sum due them under the treaties, the jurisdictional acts of 1902 and 1903 would have reopened the case as against this receipt; otherwise the acts would have been a mockery, since both the Cherokees and the United States well knew of the notorious settlement of 1852 and the receipt given at that time.

The account rendered by the United States in 1894, which proposed to render a statement of the "*moneys due*" under the treaties and the laws relating thereto and authorizing the Cherokees to bring suit for the correction of any errors in said accounting, itself reopened the entire question.

Government counsel argues:

Seventh. That the account rendered by the United States in 1894 was not binding on the United States because certain experts employed by the United States in making such an account, exceeded their authority, and, on the assumption that the $5,000,000 was not chargeable with removal, rendered an account not contemplated by the Cherokee agreement of 1891.

The experts did not exceed their authority.

By the agreement of 1891, it was the duty of the

United States to deliver to the Cherokees a complete account of "*moneys due.*"

This account to be rendered was not to be a mere copy of a former erroneous account; it was to be a complete account of *moneys due.* It would have been absurd to have delivered the Cherokees a transcript of the accounts of which they had complained.

By the treaty of 1866, article 22, set out below, the Cherokees had already a complete right to examine the Government accounts whenever they liked through an agent employed by them for that purpose and free access to all accounts, and it would have been no relief to them to have received a transcript of accounts showing the errors of which they had complained. They knew about these errors and they complained of them for years:

> "Article 22. The Cherokee National Council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the Government of the United States, at such time as they may see proper, and to continue or discharge such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge."

It is evident that the Cherokees, in asking an account to be rendered of moneys due in the agreement of December 19, 1891, were asking something more than they already had. They already had the opportunity at any time to make a copy of the accounts, as they stood with their errors, and it would have been no additional advantage whatever, unless the accounting proposed in such agreement meant something more than they already had.

In the proposed accounting it was agreed—

> "If it shall be found, upon such accounting, that any sum of money has been so withheld, the amount shall be duly appropriated by Congress."

If the accounting proposed was merely to be a copy, it meant that nothing would be found due. Why then this language, "if it shall be found upon any accounting that any sum of money has been so withheld." The accounts, as they were, denied any indebtedness. A copy of them could not possibly have found any money due, and, therefore, this language would have no significance whatever.

The positive determination that the $5,000,000 fund was not chargeable with removal expense was authorized and unavoidable in rendering a correct account. It was not "an assumption" by the experts employed by the United States.

Their language, after giving a complete history of the transactions involved, and quoting article 9, is as follows:

> "This article provides substantially, as will be seen, for a settlement with the Cherokee Nation upon the basis of the treaty of 1835, and for the deduction from the sum of $6,647,067.00 of the charges properly to be made against it, under the terms of that treaty, and the distribution per capita of the residuum. It is evident from the use of the word 'properly' in this section that it was not the intention to increase or enlarge the deductions which were to be made from the treaty fund, either in numbers or in character. Whatever was properly chargeable under the fifteenth article of the treaty of 1835, was also chargeable under the ninth article of the treaty of 1846, but nothing more" (Ex. 1, 29).

This is not "an assumption" by the experts, it is a declaration of principle which they were authorized to

make, and which they were compelled to make in order to render a complete account "of moneys due".

Attorney-General John J. Crittenden, in his opinion of 1851, held that the treaty of 1846 does not expressly nor by implication abrogate any of the interests of the Cherokees in the distribution per capita provided for in articles twelve and fifteen of the treaty of 1835, that the treaty of 1846 intended to provide for the satisfaction of those claims not to forfeit, repeal, or annul any of them (5 Op., 320). Attorney-General Butler held that the cost of removal was the first charge on the $600,000.00 (3 Op., 320).

Attorney-General H. S. Legare (4 Op., 73), held July 20, 1842, that the $5,000,000 fund included nothing but what is "expressed or necessarily implied in the treaty."

Under these opinions, these experts were under competent directions and fully justified in their conclusions, if indeed they were to render "a complete account of moneys due," under the treaty of 1835 or of 1846. Although authorized to construe the treaties it was not really necessary for them to construe the treaties. It had already been done by the highest law officers of the Government.

The Commissioners who negotiated the Cherokee agreement, took great pains to explain the purpose of the Cherokees in demanding this account and their own meaning in agreeing that the account should be rendered. They said:

> "The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.
>
> "Whatever that construction is the Indian must abide by. There is no appeal except to Congress. Without going specifically into details,

> the Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, **principal and interest**, will be found due them. . . . The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected."

If this means anything, it means that the Cherokees expected a proper account to be rendered, correcting previous error and making a just account, upon a proper construction of the treaties named. They alleged that upon such an accounting "a large sum of money, principal and interest, will be found due them." They therefore demanded that a complete account of moneys *due them* should be rendered, correcting any misconstruction of treaties in past accounts, if any misconstruction had been made, and giving them the right to go into court, if they should conclude that the account was incorrect or unjust; that they should have the right in that event to sue—

> "for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly, or illegally adjusted in said accounting."

If this language means anything, it means that the United States was to render not a copy of the account complained of, not a copy of an account showing nothing due, but "a complete account of *moneys due*" upon a fair construction of the treaties. The Cherokees believed, upon such an accounting, over a million dollars would be found due them, with interest from June

12, 1838, the per capita, of which they had been denied in 1852, and of which they had been complaining, as a national grievance, for forty years.

The Interior Department has its Attorney-General and a complete corps of legal advisers and in rendering this account did so under competent legal advice.

There is not the slightest doubt that the Cherokees understood that the United States would render them a correct account of moneys due, and not render them merely a copy of the account of which they complained, showing nothing due.

The account was to be rendered by the United States, the vendee of 8,000,000 acres of land, as a consideration moving the Cherokees, as vendors to sell. It was not to be rendered by experts or by individuals and **it was not rendered by experts or individuals. It was rendered by the United States** through its chosen agencies under the authority of Congress. **It was the act of the United States.**

Government counsel argues:

Eighth. That in any event interest should not be allowed, because the case of the Eastern Cherokees is different from the case of the Western Cherokees; that it is different in the particular that the accounting officers in making the Western Cherokee settlement were in error in charging the $5,000,000 fund with subsistence, whereas in the Eastern Cherokees case they were not in error in charging the $5,000,000 fund with the cost of removal.

Upon this argument the Eastern Cherokees are entitled to recover, because they have shown that the accounting officers of December 3, 1849, *were in error* in charging the $5,000,000 fund with the cost of removal.

The allowance of interest in the Eastern Cherokee case is identical in principle with the allowance of in-

terest by this honorable court in the Western Cherokee case.

When the treaty of 1846 was made, the Cherokees had for 11 years been denied the per capita promised, and in the settlement proposed they demanded interest. The United States agreed with the Cherokees (article 11) to leave the question of interest to the Senate, and that the Senate should determine—

> "whether the Cherokee Nation should be allowed interest on whatever sum may be found to be due the Nation, and from what date, and at what rate per annum."

This allowance of interest related to sums which "may be found to be due" thereafter, under the settlements proposed by this treaty, and it applies as much to the sum which may be found due now and which ought to have been found due then as it does to the sum which was then found due.

The Senate of the United States acted as umpire under article 11 of 1846, and on September 5, 1850, passed the following resolution:

> "*Resolved*, That it is the sense of the Senate that interest at the rate of 5% per annum shall be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th of June, 1838, until paid" (Rec., 96).

On April 3, 1893, the Supreme Court of the United States found that a certain sum of $212,376.94 "should have been found due" the Western Cherokees in the settlement of 1851, and that the decision of the Senate in respect to interest was controlling, and that, therefore, interest should be allowed from June 12, 1838, upon the balance indicated (148 U. S., 487).

The Supreme Court, through Mr. Chief Justice Fuller, said (italics ours):

> "By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was de-

> cided that interest should be allowed at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum *then found due was less than should have been found due by the amount of $212,376.94.*
>
> "Under section 1091 of the Revised Statutes, no interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest; and in Tillson *vs.* The United States, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest (9 Stats., 556, C. 91).
>
> "In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item $4,179.26, which stands upon different ground" (148 U. S., 478).

On numerous occasions thereafter Congress confirmed this principle and recognized the decision of the Senate as controlling, to wit: On September 30, 1850 (9 Stats., 556); on September 27, 1851 (9 Stats., 572); on August 23, 1894 (28 Stats., 451); on March 3, 1899 (30 Stats., 1235).

The case of the Eastern Cherokees is precisely the

same. It is identical with that of the Western Cherokees. The sum "then found due the Eastern Cherokees" in the per capita of 1852 "was less than should have been found due by the amount of" $1,111,284.70. Article II of that treaty provided that the question—

> "whether the Cherokee Nation should be allowed interest on whatever sum may be found to be due the nation, and from what date, and at what rate per annum."

And the Senate made the same decision precisely as to the Eastern Cherokees and Western Cherokees, at the same time and in the same manner.

It was determined by the same identical resolution of the Senate of Sept. 5, 1850 (supra).

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself."

Indeed, the question of interest was also "a subject of difference while the negotiations were being carried on" in 1891, "the determination of which was provided for in the agreement of December 19, 1891" (R., 104, sec. 8).

The commissioners negotiating that agreement expressly say:

> "The Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, PRINCIPAL AND INTEREST, will be found due them" (R., 104, sec. 8).

This refers to the per capita promised them by treaty of 1835–36 and 1846, withheld from them in 1852, and which was due, with interest.

The Cherokee agreement of 1891 provided that this claim should be settled by the account to be rendered by the United States. It was settled, in the manner agreed on in the agreement of December 19, 1891, by the account rendered by the United States, that there was due

the Cherokees the sum they claimed, **with interest,** thus definitely determining the indebtedness in the manner provided by the agreement itself.

Under the principles laid down by this Honorable Court therefore, it has been twice authoritatively determined that this interest is due.

Indeed, the principles of justice would require interest to be paid under all the circumstances, the United States, as guardian, having used the money all these years over the protest of its wards.

When the United States rendered the complete account of moneys due, it was the bounden duty of the United States to endeavor to render it correctly and in the manner and for the purpose agreed on. The United States did do this, and found the sum of $1,111,284.70 due, with interest from June 12, 1838, to date of payment, as the balance of the per capita due under the ninth article of the treaty of 1846 (Ex. 1.27, sec. 1; 44 sec. 2). So that the United States is bound not only upon the treaty of 1846 to pay the interest, but also by the account rendered by the United States in pursuance of the contract of December 19, 1891.

Government counsel declares the allowance of interest in the account readered by the United States is an *ipse dixit* of the experts employed by the Government.

The Cherokee agreement of December 19, 1891, did not contemplate an accounting to be rendered by individuals, but by the United States, in a manner and form to be determined by the United States. The United States rendered the account. It was not done by the experts employed by the United States. They were merely a part of the machinery invoked for the rendering of this account. The Congress of the United States directed the mode by which this account should be rendered and authorized the Secretary of the Interior to employ experts.

When these experts were employed they were merely the instruments in the hands of the Interior Department, and their account was subject to review and was reviewed by the Commissioner of Indian Affairs and by the Secretary of the Interior and by their legal departments. When the Secretary of the Interior had reviewed this account and had adopted it and rendered it on May 21, 1894, to the Cherokees, it was the act of the United States, and not the act of the experts employed as one of the instrumentalities for the making of the account. If this be not true, then the United States must be held as incapable of acting through its own chosen agencies or of rendering the account proposed in the agreement of December 19, 1891, and ra ified by Congress March 3, 1893—a theory which is absolutely untenable. The United States was capable of carrying out and was authorized to carry out this agreement. It did carry it out and it did render the account in the manner and form agreed on, and it is bound by the account rendered, and it was the duty of the United States to have immediately paid the amount found due upon such accounting under the plain letter of the contract of December 19, 1891.

In a reply brief Government counsel enlarges on the account rendered by the United States not being an account stated and being merely the unauthorized account of two laymen based on erroneous assumptions of law, when they should merely have furnished the Cherokees a clean copy of old accounts without review (which the Cherokees already had, East. 22, Treaty, 1866).

We respectfully reply that the account rendered was not the account of two laymen, but of the United States, made under authority of Congress in the manner and form directed by the United States; that the account of moneys due could have been rendered in no other way by the agencies of the Government; that they were obliged to construe the treaties in order to "properly

render" it as directed by statute (Rec., 107, sec. 3); that they had the legal advice of the law departments of both the Indian Office and of the Interior Department, which is fully equipped with its own attorney-general and his corps of competent assistants.

When they settled on a legal construction of the treaties, as they did, it was no "assumption," but a construction duly authorized and made under competent legal advice.

When the Secretary of the Interior acted in transmitting this account to the Cherokees he did so under competent legal advice, and his act was the act of the United States.

The cases of State *vs.* Brown and Nutt *vs.* U. S., cited (Ibid., 5), are obviously entirely different and without force in this case.

Government counsel denies that the per capita of the Cherokees is a trust fund. He is perfectly answered by article 5 of the Cherokee treaty of 1846, which describes the per capita as a trust fund.

The $1,047,067 appropriated June 12, 1838, for removal and *to aid in* subsistence had the express proviso that no part of such fund so appropriated for removal should be charged to the $5,000,000 fund. In point of fact, it was left untouched in the Treasury until 1839, until the removal was completed. The money for removal, in express disregard of the statute, was taken from the $5,000,000.

Government counsel callously explains (p. 11) that it was "a matter of indifference." If the moneys appropriated for removal, $1,647,067, had been used as directed it would have left the $5,000,000 intact and the Eastern Cherokees would, in 1852, have received the fund now in suit and it is most emphatically not "a matter of indifference."

On page 13 reply brief Government counsel says that

at this eleventh hour Eastern Cherokees allege that the fund in controversy had been paid to Capt. John Page, an "agent of the Government," and should be reimbursed under art. 3, treaty 1846, which had agreed "to reimburse all the other sums paid to any agent of the Government and improperly charged to said fund" [$5,000,000 fund]. That this proposition, if true, "i s the end of the controversy in this case." For proof of its truth see H. R. Rept., 1098, 27 Cong., 2d Sess., p. 69, and Treasury Disbursements, 1838, Rec., 90. We agree that this disposes of Government's defense and made this contention in the Court of Claims; but Government counsel sagely remarks that this refers only to special sums paid to agents for private salaries and personal expenses.

That it does not really mean what it says so strongly, "to reimburse all the other sums paid to any agent," but only the little sums paid for personal services.

That it does not refer to the sums paid out of that fund in large amounts to agents on their bonds and by them erroneously disbursed or embezzled (and there were important sums so embezzled and refunded), but only refers to the private salaries of the agents of the United States.

The language means what it plainly says, and can not be set aside, and completely disposes of the Government's defense.

The United States ought to have paid this money in 1838 and did not. It ought to have paid it in 1852 and did not. It ought to have paid it in 1895 and did not.

One of the frailties of Government is that Government agencies are, at last, but human, with the weaknesses of human nature. Many of the accounting officers and officials of the Government believe they serve the Government when by art, or craft, or by force they protect the Treasury from every claim, good or bad, sound or unsound, just or unjust. Such officials feel it to be a virtue

to construe the treaties against the Indian, unmindful of the true meaning or the better and more righteous interpretation.

It is this spirit which deprived the helpless Cherokees of the per capita promised them as the purchase price of their lands east of the Mississippi River.

Against this erroneous conception of duty, there has been found no adequate remedy, except in the courts of the United States. Congress has therefore referred the case of the Cherokees to this Honorable Court, where at last justice may be done.

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FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.
No. 346.

THE EASTERN CHEROKEES, APPELLANT,
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Reply Brief of the Eastern Cherokees to the Brief of the Cherokee Nation.

The Cherokee Nation, as a body politic, a government, is in the singular position of repudiating the last official act of the Cherokee Nation as a government in regard to the fund in controversy, to wit: The act of the Cherokee

National Council of December 7, 1900 (Rec., 40), which declared this fund due exclusively to the Eastern Cherokees.

This government was abolished in 1898. It has no judicial department, no legislative department, no laws capable of execution, no executive department except a nominal chief, with absolutely no authority, but declares itself in this suit the "rightful claimant" under the jurisdictional act, and claims, in the face of its own pleadings to the contrary (R., 1, 40, 115), to be a trustee or agency through which a decree must pass to the equitable owners.

It sues as a government when the jurisdictional act authorizes a suit only of the *tribe* or band thereof. The jurisdictional act does not authorize the suit of the Cherokee government or "any band thereof," and obviously a government can not be divided into bands (R., 77).

The bands referred to and which have heretofore appeared in court are the Western Cherokees, the Eastern Cherokees, the Delawares, the Shawnees, the Freedmen, and the adopted whites.

None of these bands have sued in this case except the Eastern Cherokees, and none of the bands make any claims for the per capita fund in controversy except the Eastern Cherokees.

The "Cherokee Nation" claims the fund on the theory that the "Cherokee Nation" as a government was the principal to the contract of December 19, 1891. The "body politic" asserts that *it* "furnished the consideration" in the lands of the outlet. That it was in payment of these lands the United States agreed to render the account and pay the amount found due to the National Council of the Cherokee Nation, that is, to the government under the title "Cherokee Nation."

The Eastern Cherokees reply:

That the "Cherokee Nation" **as a government** did

not own the outlet. The outlet was the property of the Cherokee Tribe, "of the whole Cherokee people," under article 1, treaty of 1846 (R., 93, par. 4);

That there is no Cherokee Council in existence now to whom this fund could be paid, as proposed in the agreement of 1891;

That the "Cherokee Nation" as a government making the agreement of 1891 was only a representative of the Cherokees as a tribe of people, and that this representative was not even allowed by Congress in ratifying the agreement of 1891 by the act of March 3, 1893, to receive any of the cash consideration agreed to be paid for the outlet that belonged to any protesting band of the tribe.

The Congress of the United States retained nearly $2,000,000 of the cash consideration agreed to be paid by act of March 3, 1893, and refused to pay it to the Cherokee National Council or to the Cherokee government, and the United States, under the decisions of this honorable court in the Delaware and Shawnee cases against the Cherokee Nation, and the decision of the Court of Claims in the Freedmen case, refused to pay such funds, due to these bands, over to the Cherokee Nation as a government. This act of Congress repealed pro tanto this agreement to pay the "Cherokee Nation" as a body politic, and illustrates the true meaning of the agreement, which is that these payments were to be made to Cherokees as their rights equitably appeared, and not to a corrupt and untrustworthy government.

On June 28, 1898, Congress repealed the remainder of the proposition, that money might be paid to this so-called body politic, by section 19 of the Curtis Act, which expressly declared that in the future no moneys should be paid by the United States to any of the tribal governments in Indian Territory. Indeed, this act of Congress abolished the tribal governments then and

there, except in name, on the ground, as set forth by this honorable court in Stevens *vs.* Cherokee Nation, 174 U. S., 445, that these governments were reported by the United States Commission to the Five Civilized Tribes, of which Hon. Henry L. Dawes was chairman, that these "so-called governments" "in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

It is obvious the suit of the Cherokee government appearing under the title "Cherokee Nation" should have been brought by the title "Cherokee Tribe" as instructed by the jurisdictional act (R., 77). The tribe furnished the outlet, and the tribe was the principal in that contract of December 19, 1891, while the Cherokee government designated "Cherokee Nation" was merely an agency through which the tribe acted.

The agent is dead. The tribe survived.

The agency had no estate. The tribe had an estate.

The agency was destroyed by act of Congress June 28, 1898. The tribe annulled the tribal compact as of September 1, 1902, by the vote of the Cherokee people of August 7, 1902, under authority of the act of Congress of July 1, 1902 (Cherokee Allotment Act). (See brief, Cherokee Nation, p. 6, secs. 26, 27, 28, 29, 31.) The estate of the tribe was by this act distributed, and the tribe as a tribe ceased to exist September 1, 1902. Of course, as a decedent, it had an estate and was permitted to bring suit on any claim "the Cherokee Tribe" had, as set forth in section 68 (Ibid., page 8). It was the Cherokee Tribe, and not the Cherokee government, which was authorized to bring suit. If Congress had intended that the Cherokee government might bring suit it would have described the body politic in terms unmistakable, as it

did do in the section immediately preceding section 68, to wit:

> "Sec. 63. The tribal government of the Cherokee Nation shall not continue longer than March 4, 1906."

There is no doubt what this means, but the defunct government, under the ambiguous title, "Cherokee Nation," has appeared as claimant in three different capacities in one and the same suit, to wit: First, as a government and body politic (R., 1); second, as trustee for the tribe (Brief, 100); third, as a possible trustee for the Eastern Cherokees, who were members of the tribe, and of other Eastern Cherokees who are not members of the tribe (Brief, 109, sec. 4).

The Cherokee government brought its suit as a "body politic" (R., 1).

The Cherokee government denied the last official declaration of its National Council and principal chief, that this fund in controversy was exclusively the fund of the Eastern Cherokees, and denied that it had any trust relation whatever to the Eastern Cherokees (R., 40).

This so-called government appealed against the decision of the Court of Claims directing the fund to be paid the Eastern and Western Cherokees (R., 115), on the ground that the body politic as a government was entitled as a matter of common law, but that the fund when distributed would go to the Delawares, Shawnees and Freedmen, as well as to the Cherokees, but that no part of it should go to the Eastern Cherokees, who were not members of the Cherokee Tribe in Indian Territory (Brief, p. 109).

The Cherokee government insists that it is entitled because this is merely a suit at common law (Brief, 100, etc.).

If ever there was a suit in equity, this is a suit in equity. The right of the Cherokee Nation to recover is based on equity in the accounting rendered by the United States and in the treaties construed under the rules of equity, and it pleads its right by equity (Brief, 90). The suit involves the interpleading of various groups of people and individuals claiming equitable rights. The case could not be decided on common law rules. It is undoubtedly a suit in equity. It involves over 30,000 per capita claimants. It involves the trusteeship of the United States in its relation to the whole tribe, to numerous bands thereof, as well as to the individuals entitled to per capita.

The sums sued for are four in number. To three of these funds the Cherokee Tribe is the "rightful claimant." To one of these funds the Eastern Cherokees, whether west of the Mississippi or east of the Mississippi, are the "rightful claimants" under the express direction of article 9 of the treaty of 1846 (R., 96, 109), and the act of the Cherokee National Council of December 7, 1900, concedes this (R., 40).

The jurisdictional act directed the Court of Claims to render judgment to the "rightful claimant" (R., 78). There are two "rightful claimants," therefore, and both of the "rightful claimants" are composite bodies. It was necessary in the jurisdictional act, on this very contingency, to direct the court in its decree to determine to whom the judgment so rendered equitably belongs. Who are the equitable owners of the fund due the tribe? We respectfully submit the members of the tribe as fixed by the rolls of September 1, 1902, under the Cherokee Allotment Act, are the equitable owners of the three funds due the tribe.

Who are the equitable owners of the fund due the Eastern Cherokees? We respectfully submit, the people designated by the 9th article of the treaty of 1846, and

their legal representatives, as pointed out by that article.

The so-called Cherokee Nation, body politic, suing in this cause, has argued strenuously that the receipt of 1852 was binding on the Eastern Cherokees; that the Eastern Cherokees did not protest. It denies the competency of the National Council to protest for the Eastern Cherokees November 27, 1857. It would thus defeat the Eastern Cherokees, comprising almost the whole of the Cherokee citizenship of the Cherokee Tribe west in order to secure for this late body politic a common law judgment in the interest of a few adopted Shawnees and Freedmen who make no claim. This plea recalls the two women contending for the possession of the child before King Solomon, where the unjust claimant was willing to have the child cut in twain in order to get her share.

This so-called Cherokee Nation, claiming to be a body politic, although confessedly without a single function of government, is now claiming a fund which the nation has twice decided belongs to the Eastern Cherokees, once in the treaty of 1846 and again in its last will and testament of December 7, 1900.

It claims a fund which can never come into its hands and can never benefit this alleged body politic one dollar.

The so-called Cherokee Nation in this suit has contended that the Eastern Cherokees were under contract by the treaty of 1835 to move within two years and that when they did not move they abandoned their per capita right. The answer to this is, that article 12 of the treaty of 1835 declares in precise terms the exact contrary, that those who wished to remain might do so and not lose their per capita rights, but would lose, and did lose, their rights in the western lands and in the communal funds which went west with the tribe. This contention is further completely met by the tenth article of the treaty of 1846 (R., 96).

This alleged body politic contends that the body

politic bought this per capita due the Eastern Cherokees by the Cherokee agreement of December 19, 1891, in which the United States agreed to render an account and pay its old debts. The answer to this is, that the United States, in promising to pay its old debts, merely intended to pay them in accordance with the true meaning of the treaties.

That the United States had no purpose of selling the per capita due the Eastern Cherokees to the Delawares and Shawnees.

That the Eastern Cherokees, who controlled the Cherokee government, and who wrote this section for their own benefit, had no intention whatever of transferring the debt due them to the Shawnees and Freedmen.

This per capita was a vested personal individual right. It was a claim on the United States. The statutes of the United States expressly forbid the transfer of claims against the United States from one person to another, and, moreover, it being an individual claim, and the Eastern Cherokees having no organization, could not even appear to convey. Beside these insuperable difficulties of transferring this per capita, the individuals to whom it was due embraced thousands of minors, married women, and incompetents and individuals scattered over the States of the Union, containing many thousands of people who were not in any way connected with the Cherokee Nation as a body politic. What consideration passed from the Shawnees to the Eastern Cherokees to pay for this transfer of title to the Eastern Cherokee per capita?

The theory of the so-called Cherokee Nation, that Congress intended to exercise its sovereign authority, and did exercise it, in transferring the per capita due the Eastern Cherokees of North Carolina and other States, to the Shawnees and Freedmen, is absurd. Congress did nothing of the kind.

The final theory of this claimant is, that Congress, although having the sovereign power to transfer the per capita due the North Carolina Cherokees, who earnestly claim it, to the Shawnees and Freedmen, who don't claim it, had no legal authority to give the Court of Claims equitable jurisdiction to hear the North Carolina Cherokees, and that this honorable court "would have no legal authority to destroy the right and the title" "which the whole Nation purchased" (Brief, 117, 105), would seem to answer itself. Congress has full power to pass the jurisdictional act, and this honorable court would destroy no title of the body politic in the per capita, because it has none. It is true that the agreement of 1891 was made with the "Cherokee Nation" as a government; that in this agreement the United States agreed to pay the Cherokee government as an agency of the people over $8,000,000 in cash, and to render an account of moneys due under the old treaties and pay the amount found due to the National Council; nevertheless, on March 3, 1893, Congress in ratifying the Cherokee agreement refused to pay the cash consideration agreed on to this "Cherokee Nation" as an agent of the Cherokees, because it had already been found untrustworthy. Congress retained nearly $2,000,000 of this fund in the treasury, which was subsequently paid out to the bands of the tribe who were entitled to it, disregarding and repealing the agreement to pay these funds to the Cherokee government, because the government had been shown to be untrustworthy.

On June, 1898, Congress entirely repealed the act of March 3, 1893, which had promised payment of these funds to the Cherokee government, by section 19 of the Curtis Act, which declared that no moneys, on any account whatever, should thereafter be paid to such Cherokee government, and yet this defunct government, without either legislative, executive, or judicial functions,

comes into court and demands this fund as against the equitable owners. for itself or as agent or as trustee, as the court may permit.

It caps the climax when in its brief (109), after having vigorously opposed the Eastern Cherokees for three years, and having denied any relation of trust, it finally says:

> "A judgment in favor of the Cherokee Nation must, therefore, affirm a right in each and every member of the Nation, in the proceeds of that judgment, unless it be held further, that in making the agreement of 1891–3, the Nation was a mere trustee for particular members, or, indeed, among others, for some Cherokees who have long ceased to be members."

The So-Called "Cherokee Nation" as Trustee.

This is the same alleged "Cherokee Nation" which vigorously denied its trust relation to the Eastern Cherokees (R., 40); which appealed from a judgment in its favor as trustee of the Eastern and Western Cherokees (R., 115), and denounces the right of the Eastern Cherokees to recover, but now meekly suggests that, after all, a judgment in its favor would affirm a right in over 30,000 Eastern Cherokees, and also to the Western Cherokees, and even to the Eastern Cherokees of North Carolina.

This so-called body politic has no capacity to represent anybody as trustee or agent, not even itself. It appears in this court upon the sole authority of one Cherokee citizen, to wit, Mr. Thomas M. Buffington, principal chief, without any pretense of authority from the Cherokee National Council. Mr. Buffington acted for the tribe, with the approval of the Government, and brought this action to present the claims of the Cherokee Tribe under section 68 (act July 1, 1902), as shown by the authority filed in this cause (R., 5, 38, 39).

The Court of Claims was obliged to make the United States trustee for the three items due the Cherokee Tribe (R., 112, 113). The United States has always been the trustee of the Eastern Cherokees for the per capita promised them and appropriated for their benefit, July 2, 1836 (5 Stats., 73).

The "Cherokee Nation" "as a tribe" has no capacity to act as trustee. The United States is trustee for the tribe. The effect of making the "Cherokee Tribe" nominal trustee for the Eastern Cherokees, thousands of whom are not members of such tribe, and then directing the United States to act as trustee for the Cherokee Tribe, nominal trustee for such Eastern Cherokees, to execute the trust, is merely to deprive the Eastern Cherokees of a part of their per capita, contracted by Mr. Buffington to counsel as compensation for opposing the Eastern Cherokees, and attempting to defeat them.

A court of equity will not charge a trust fund with the expense incurred by the trustee in an attempt by him to defeat the establishment of the trust and to seize the fund for himself.

On the 28th of June, 1898, Congress deprived this body politic of all future capacity to receive, as trustee, one dollar, on any account whatever, for any of its members—Delawares, Shawnees, Freedmen, Western Cherokees, and Eastern Cherokees. Congress, by the act of July 1, 1902, confirmed this action by the further provision that the funds and lands of the tribe should be distributed by the United States to the members of the tribe, the United States acting as trustee, as to all lands and moneys, for all members of the tribe, and that this alleged government should have no future function as trustee in any capacity. Thereupon the whole Cherokee people gave this act their sanction and placed the great seal of their approval upon these decrees by their vote of August 7, 1902.

Thereupon this so-called government comes into court and pleads that, after all, it would be well to recognize it as trustee, as a common law right, and as an equitable claimant at the same time, because—

> "the Slade and Bender account need not, and, we suggest, does not, rest upon the letter of the treaties of 1835 and 1846. It builds upon equity, promises equity, with due regard to the principles of broad justice and sound policy," etc. (Brief, 90).

The trial court, in effect, gave them a common law judgment, and decreed the Eastern and Western Cherokees the equitable owners.

The Cherokee Tribe can not recover judgment for itself as the "rightful claimant," because—

First, it is not the "rightful claimant," but by act of December 7, 1900, it conceded that the fund belonged to the Eastern Cherokees.

Second, the "Cherokee Tribe," of Indian Territory, as now constituted, did not own the land in Georgia, of which this fund is the proceeds.

Third, the treaties of 1835–6 and 1846 pledged this fund expressly to the Eastern Cherokees and not to the present Cherokee Tribe, of Indian Territory.

Fourth, the Eastern Cherokees, with full capacity to sue in this equity cause, are the "rightful claimants" as against the Cherokee Tribe, because they are the owners of the fund.

The Cherokee Tribe can not recover as trustee, because—

First, it did not sue as trustee.

Second, it has expressly denied the trust.

Third, it has attempted to defeat the cestui que trust, and claimed the fund for itself.

Fourth, it is not authorized to sue as trustee, but only for itself.

Each band was likewise authorized to sue for itself.

Fifth, the tribe has not capacity as trustee to receive

funds due its own members, but the United States, under the act of June 28, 1898, section 19, and the act of July 1, 1902 (The Cherokee Allotment Act), is trustee for all members of the Cherokee Tribe, and the trial court directed the three items due the tribe to be paid to the United States as trustee for the tribe.

Seventh, the tribe, as a tribe, by its own vote, terminated, as of the date fixed by itself, September 1, 1902.

Eighth, the tribe never had any relation of trust or privity with thousands of Eastern Cherokees who are not members of the tribe.

Ninth, the United States, by Act of July 2, 1836 (5 Stats., 73), became trustee for this per capita fund, and is now trustee and always has been trustee of every individual entitled to the per capita in question. The United States has not been discharged as trustee, and its obligation as such will not terminate until it has paid its cestui que trust the per capita promised.

Tenth, the Congress of the United States, in the jurisdictional act of March 3, 1903, authorized the Eastern Cherokees of Indian Territory and the Eastern Cherokees east of the Mississippi River to bring a suit in equity against the United States (their trustee) and against the Cherokee Nation, an adverse claimant to the fund, as explained by Attorney-General Knox in the reference in the jurisdictional act contained.

It follows that if the Eastern Cherokees are "rightful claimants" against the Cherokee Tribe, which has in this suit strongly denied the right of the Eastern Cherokees to recover, then the Eastern Cherokees are entitled to a direct judgment without any deduction on account of any contract of their adverse claimant, the Cherokee Tribe. The Eastern Cherokees can not be equitably charged with the expense incurred in the name of the tribe in an effort to defeat the establishment of their rights.

The jurisdictional act of March 3, 1903, gave the trial

court jurisdiction of the very claim in question, involving in the completest manner, principal and interest, and setting forth the entire history found in the references in the jurisdictional act contained. Congress, having on April 28, 1902, received the findings of fact of the Court of Claims, upon the said claim, and having been advised by the Attorney-General in his report of January 22, 1903, referred to in the jurisdictional act, that there were two claimants and that provision should be made for the determination of the "rightful claimant," passed the jurisdictional act authorizing a suit in equity to be brought by the Eastern Cherokees against the United States [their trustee], and against the Cherokee Nation, which claimed the same fund adversely to the Eastern Cherokees.

Under these jurisdictional acts, if there was a claim of the tribe the Cherokee Tribe should prosecute. If there were claims of the bands of the tribes, the bands and not the tribe should prosecute them. No band could prosecute a tribal claim, and obviously the tribe could not prosecute a claim which belonged solely to one of the bands of the tribe. The tribe was empowered to proceed for itself, and similar power was conferred upon each band of the tribe. If, therefore, the court should determine that the fund now in question equitably belongs to the Eastern Cherokees it must regard the jurisdictional act and give its judgment to them.

The Eastern Cherokees, therefore, respectfully submit that this honorable court now direct a decree to be entered by the Court of Claims in favor of the Eastern Cherokees, as the "rightful claimant" to the fund in question, to wit: In the sum of $1,111,284.70, with interest at the rate of 5 per centum per annum from January 12, 1838, until paid, less such counsel fees and expenses as may be allowed by that court under the provisions of the act of March 3, 1903, and that such decree shall further declare that the equitable owners of the

fund so adjudged due to the "Eastern Cherokees" are the persons as described by article 9 of the treaty of 1846, to wit: "All those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty, and the supplement thereto," and that such fund shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following.

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof, and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern Cherokees, as described by article 9 of the treaty of 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

It is respectfully submitted such judgment will fully satisfy the obligations of the United States under article 15 of the treaty of 1835–36, under article 9 of the treaty of 1846, and under the accounting rendered by the United States on May 21, 1894. Such judgment will also satisfy the people of the Indian Territory, because the Eastern Cherokees alone in the Indian Territory claim the fund, and it will satisfy the Eastern Cherokees east of the Mississippi River.

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